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Paper No. 9
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Applied Biosciences Corporation

Serial No. 75/411,268

James E. Clevenger for Applied Biosciences Corporation.

Barney L. Charlon, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Simms, Cissel and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Applied Biosciences Corporation to register the mark EARTH PLUS for "fertilizer and soil activator for agricultural use."[1]

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used in connection with applicant's goods,

[1] Application Serial No. 75/411,268, filed December 29, 1997; alleging dates of first use on April 14, 1997. The word "EARTH" has been disclaimed.

so resembles the following registered mark for "chemicals-namely, fertilizers and soil conditioners" as to be likely to cause confusion.[2]

EarthLife Plus

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

In any likelihood of confusion analysis, we look to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. See In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999) and In re L.C. Licensing Inc., 49 USPQ2d 1379 (TTAB 1998).

The Examining Attorney argues that applicant's goods (fertilizer) and registrant's goods (chemical fertilizer) are "virtually identical" (Office action no. 1, p. 2.) and as such must be deemed to travel in the same channels of trade to the same classes of purchasers.

[2] Registration No. 1,251,959; issued September 27, 1983; combined Sections 8 & 15 affidavit filed.

Applicant, on the other hand, states that the goods sold under its mark are not chemicals, but instead are "a liquid organic compound comprising seaweed, humic acid and hydrolized proteins," and moreover that the composition of the goods is clearly stated on the containers for the goods. While admitting that "the goods are related, in that they ...are both used as fertilizer..." applicant maintains that, given the different composition of the two products, the goods are not "virtually identical."

First, it is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Thus, it is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

In this case, however, since registrant's chemical fertilizers are fully encompassed by applicant's broadly

described fertilizers for agricultural use, the goods must be considered legally identical, directly competitive products. Applicant's attempt to distinguish its fertilizers from those of registrant based on the different compositions of the products is unavailing.[3] As the Examining Attorney points out, the question of likelihood of confusion is determined on the basis of the goods as identified in the application and registration without restrictions on the goods that are not reflected therein. See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 1464, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991) and Saks & Co. v. Snack Food Association, 12 USPQ2d 1833 (TTAB 1989). While registrant's goods, as identified, are restricted to chemical fertilizers, there is no such restriction in the application as to the nature or composition of applicant's fertilizers. In the absence of any such restrictions in the application, it must be presumed that applicant's goods encompass fertilizers of all types, including

[3] Applicant states in its brief that "[a]s noted [in] the applicant's *amendment* filed in response to the first Office Action, applicant's goods are a liquid organic compound comprising seaweed, humic acid and hydrolozed proteins." (Emphasis added). We take the word "amendment" in that statement to refer, generally, to applicant's response to the Office action since at no time during the prosecution of this case did applicant request any such amendment to the identification of goods.

chemical fertilizers.[4] Similarly, since there are no restrictions in the registration as to use, channels of trade or classes of customers for registrant's fertilizers, it is reasonable to assume that registrant's fertilizers are used for all purposes including agricultural purposes and that the trade channels and classes of purchasers for the respective goods are the same.

We agree with applicant that the overlapping customers for the respective goods would be relatively careful and knowledgeable purchasers. However, even knowledgeable buyers of commercial goods are not immune from source confusion, particularly under circumstances where identical goods are sold to those purchasers under similar marks. See, e.g., Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1547, 14 USPQ2d 1840 (Fed. Cir. 1990).

Thus we turn our attention to the marks, keeping in mind that when marks would appear on identical or closely related goods, the degree of similarity between the marks necessary to support a finding of likely confusion declines. Century 21 Real

[4] In any event, the Examining Attorney has submitted a number of third-party registrations which show, in each instance, a mark which is registered for both organic and inorganic fertilizers. This evidence tends to show that purchasers would expect fertilizers such as those of applicant and registrant to emanate from the same source. See, e.g., In re Albert Trostel & Sons Co., supra at 1785-86. Thus, even taking into account the different compositions of the products, they would nonetheless be considered closely related.

Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

We find that applicant's mark EARTH PLUS and registrant's stylized mark EARTHLIFE PLUS are similar in sound, appearance and meaning. Applicant's mark incorporates two significant elements of the registered mark, the words EARTH and PLUS, and those words appear in applicant's mark in the same sequence as registrant's mark. As applicant points out, there are differences in the two marks. The one-syllable word LIFE appears in the middle of EARTH and PLUS in registrant's mark and registrant's mark is depicted in a slightly stylized form.

However, bearing in mind that the comparison of the marks is not made on a side-by-side basis and that recall of purchasers is often hazy and imperfect, these differences are not so significant as to eliminate the likelihood of confusion.

The stylization of registrant's mark results only in a modest visual difference in the marks which, if it is remembered at all, is clearly not sufficient to distinguish one mark from another. In addition, applicant's mark, presented in typed form, is not restricted to any particular style of lettering, and thus may be used by applicant in the same stylization used by registrant. See Squirtco v. Tomy corporation, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983).

Moreover, it has been held that the addition of another word to one of two otherwise similar marks will not necessarily serve to avoid a likelihood of confusion, particularly where additional word does not significantly change the meaning the terms convey. See, e.g., Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), affirmed in unpublished opinion, Appeal No. 92-1086 (Fed. Cir. June 5, 1992); In re Christian Dior, S.A., 225 USPQ 533 (TTAB 1985) and In re Cosvetic Laboratories, Inc., 202 USPQ 842 (TTAB 1979). The combined term EARTHLIFE, particularly when considered in the context of fertilizers, only slightly alters the meaning conveyed by the word EARTH alone, the latter term suggesting the soil itself and the former suggesting a related concept of giving life to the soil. Purchasers familiar with applicant's EARTH PLUS, upon seeing registrant's mark EARTHLIFE PLUS on virtually identical goods, are likely to be confused inasmuch as both marks have a similar connotation.

Finally, we note that while EARTHLIFE PLUS may be suggestive of the identified goods, there is no evidence of third-party registrations or uses of similar marks in the relevant market or any other evidence in the record to support applicant's claim that registrant's mark is weak and entitled to only a narrow scope of protection.

We conclude that applicant's mark EARTH PLUS for fertilizers for agricultural use is likely to cause confusion with

registrant's similar mark EARTHLIFE PLUS in stylized form for essentially identical goods.[5]

Decision: The refusal to register is affirmed.

[5] We note that applicant has relied on the facts of a number of different cases to support its position that the marks herein are not likely to cause confusion. While those cases may provide some guidance in determining whether a particular designation is registrable, they are not factually analogous to the present case and, thus, do not require us to find that the present mark is registrable.